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No. 85-5404

IN THE

Supreme Court of the United States

October Term, 1985

TERRY B. ALLEN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Motion for Leave to File and Brief for The Mental Health Information Service, Second Judicial Department as *Amicus Curiae* in Support of Petitioner

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Motion for Leave to File an *Amicus Curiae* Brief.

The Mental Health Information Service, Second Judicial Department, (Service) respectfully moves this Court for leave to file the attached brief *amicus curiae* in this proceeding. The attorney for petitioner has consented to such filing. The Attorney General for the State of Illinois, the attorney for respondent, has not consented.

The Service is an advocacy organization that is authorized pursuant to NYMHL §29.09 and 22 NYCRR Part 694 to provide legal services to institutionalized individuals in connection with care and treatment issues. Much of the work of the Service relates to the representation of in-

voluntarily confined patients at civil commitment hearings and the litigating of issues pertaining to civil commitment.

In refusing to provide consent to the Service, Mark Rotert, Assistant Attorney General, gave three reasons for such refusal. None however, contain sufficient justification. He stated that the Office of the Attorney General consented to the filing of an *amicus curiae* brief on behalf of the American Psychiatric Association. He further added that he could not answer contentions filed by many statewide advocacy organizations and was confident that petitioner's attorney could adequately address all issues on behalf of petitioner.

I have spoken with Peter A. Carusona of the Office of the State Appellate Defender, the attorney for petitioner and based upon such conversation, I believe the Service has taken a legal position different than either the American Psychiatric or either party to this proceeding. Indeed, Mr. Carusona has stated the Service has taken a perspective different than any other *amici* in this case. Because of the importance of this action, *amicus* respectfully submits that this Court should have as many views as possible when deciding the matter at hand.

The Service seeks leave to file an *amicus curiae* brief in order to present this Court with its legal position on a central issue in this proceeding, namely: Whether the privilege against self-incrimination attaches at the adjudicatory stage in a civil commitment proceeding? This issue is of particular importance to the Service because it is presently litigating the issue in *Ughetto et al. v. Acrish & Shah*, ____ Misc. 2d ____, 494 N.Y.S. 2d 943 (Sup. Ct., Dutchess Co. 1985), and this Court's determination of the question at hand will dispose of this issue within the lawsuit.

For the reasons given, the Service respectfully requests that this Court grant it leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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Brief for the Mental Health Information Service, Second Judicial Department as *Amicus Curiae.*

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Statement of Interest.

The Mental Health Information Service, Second Judicial Department represents institutionalized patients confined in New York's Second Judicial Department in matters relating to care and treatment. Hence a substantial portion of this organization's work involves representing patients at commitment hearings and litigating issues that pertain to civil commitment. This case particularly concerns the Mental Health Information Service because a number of psychiatric centers within the Second Judicial Department compel patients to undergo psychiatric examinations, conducted by non-treating psychiatrists, for the express purpose of eliciting information that the hospital can use at the patient's commitment hearing. The Mental Health Information Service has instituted litigation to determine whether or not a patient can assert the privilege against self-incrimination to refuse to submit to such an examination. *Ughetto et al. v. Acrish & Shah,* ____ Misc. 2d ____, 494 N.Y.S. 2d 943 (Sup. Ct., Dutchess Co. 1985). A decision by this Court as to whether or not the privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment hearing will dispose of the issue raised in *Ughetto* and will directly affect the clientele of the Mental Health Information Service.

Summary of Argument.

When determining whether or not the privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment proceeding, this court must apply a standard of "fundamental fairness." Just what constitutes "fundamental fairness" entails evaluating a number of factors: How a compelled psychiatric examination at the adjudicatory stage of a civil commitment hear-

ing implicates the values underlying the privilege against self-incrimination; the loss of liberty that an individual suffers from commitment; and, the degree to which imposition of the privilege will impact upon a commitment hearing. A compelled psychiatric examination at the adjudicatory stage alters the state-individual balance, converts our system of justice from an accusatory to an inquisitorial system and invades the "private enclave" of the subject. Furthermore, a civil committee suffers from both a loss of liberty and the imposition of stigma as a result of commitment, and application of the privilege at the adjudicatory stage will not impact adversely upon the state's interest in committing dangerous mentally ill individuals. As such, the privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment proceeding.

ARGUMENT.

The privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment proceeding.

Civil commitment entails a "massive curtailment of liberty," *Humphrey v. Cady,* 405 U.S. 504, 509 (1972), that requires due process protection. *Addington v. Texas,* 441 U.S. 418, 425 (1979). Due process is an admittedly flexible mechanism that calls for varying procedural protections depending upon the nature of the private interest at stake and the government function involved. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). In the numerous cases, this Court has attempted to delineate the scope of the procedural protections that the Due Process Clause of the Fourteenth Amendment requires. E.g. *Malloy v. Hogan,* 378 U.S. 1 (1964); *In re Gault,* 387 U.S. 1 (1967); *Duncan v. Louisana,* 391 U.S. 145 (1968); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *In re Winship,* 397 U.S. 358

(1970); *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971); *Morrissey v. Brewer, supra,* 408 U.S.; *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Addington v. Texas, supra,* 441 U.S.; *Lassiter v. Department of Social Services,* 452 U.S. 18 (1981); *Minnesota v. Murphy,* ____ U.S. ____, 104 S. Ct. 1136 (1984). A reading of these cases lead to the following conclusions:

1- Whether or not a particular procedural guarantee within the Bill of Rights applies to a particular proceeding depends upon the following: a- The nature and function of such right and to what extent the governmental action implicates the functions of such right; b- the extent of the loss an individual suffers as a result of governmental action, and; c- how the imposition of the procedural right affects the nature and consequences of the proceeding in question;

2- The loss of physical liberty that an individual suffers because of governmental action requires far greater procedural protection than instances in which governmental action implicates any other liberty or property interest;

3- The consequences of a criminal conviction are most severe which require the greatest application of the procedural protection of the Bill of Rights. However, the consequences flowing from both a juvenile delinquency proceeding and a civil commitment hearing are almost as severe and hence, require some, but not all of the procedures within the Bill of Rights. This brief will detail these propositions and establish that the Due Process Clause of the Fourteenth Amendment requires the application of the privilege against self-incrimination to the adjudicatory stage of a civil commitment hearing.

A. Just What Due Process Mandates in a Particular Situation Requires this Court to Examine the Purpose of the Procedural Protection in Question and Its Affect Upon the Proceeding in Question.

The Supreme Court has generally employed a standard of "fundamental fairness", *McKeiver v. Pennsylvania, supra,* 403 U.S. at 543 when determining the requirements of the Due Process Clause, particularly when the proceeding in question threatens an individual's liberty. See also, *Lassiter v. Department of Social Services, supra,* U.S. 452 at 60 (*Stevens,* J. dissenting). Just what constitutes "fundamental fairness" depends in part upon how government action implicates the traditional values served by a particular procedural guarantee. For instance, in *Gault,* this Court examined the nature and function of the privilege against self-incrimination, 387 U.S. at 47, and the right to counsel, 387 U.S. at 36, and determined that the consequences of a delinquency proceeding—a loss of liberty and a delinquency finding—necessitated the imposition of the right to counsel and the privilege against self-incrimination. Similarly, this Court examined the rationale for the jury trial when determining whether or not the Due Process Clause mandates the use of jury trials upon request in criminal proceedings, *Duncan v. Louisiana, supra,* 391 U.S. at 155-157, and delinquency proceedings and determined that a delinquency proceeding did not implicate the values that a jury trial sought to preserve. *McKeiver v. Pennsylvania, supra,* 403 U.S. at 452 (*White,* J. concurring). In the same vein, a determination of the constitutionally required standard of proof in juvenile delinquency and civil commitment proceedings required an analysis of the function of the burden of proof. *In re Winship, supra,* 397 U.S. at 361-364; *Addington v. Texas, supra,* 441 U.S. at 427-428. See also *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S.

52, 55 (1964); *Pointer v. Texas,* 380 U.S. 400, 404-405 (1965), for discussion of the purposes of the privilege against self-incrimination and the right of confrontation respectively.

The impact of a particular procedural right will also affect a determination as to whether or not the Due Process Clause imposes such right in a particular setting. For instance, this Court recognized the difficulty in proving mental illness and dangerousness beyond a reasonable doubt when it concluded that a state must prove its case by clear and convicing evidence in a civil commitment proceeding. *Addington v. Texas, supra,* 441 U.S. at 429-430. The adverse impact of counsel upon the informal setting of a probation revocation proceeding dictated a conclusion that the right to counsel does not automatically attach at such hearings. *Gagnon v. Scarpelli, supra,* 411 U.S. at 787-788. This Court declined to impose the requirement of a jury trial upon delinquency proceedings, due in part to the unnecessary formalities such requirement would impose upon the juvenile justice system. *McKeiver v. Pennsylvania, supra,* 403 U.S. at 550-551. See also *Morrissey v. Brewer, supra,* 408 U.S. at 486-490.

Furthermore, when determining what due process requires, this Court has recognized that the potential deprivation that an individual may suffer is a factor to consider. *Mathews v. Eldridge, supra,* 424 U.S. at 341. The greater the loss, the more procedural protection required. This brief will establish that the loss of physical liberty that an individual suffers requires greater procedural protection than the loss of any other constitutionally protected interest with the exception of life. See *Lockett v. Ohio,* 438 U.S. 586, 604 (1978); *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).

B. A Loss of Physical Liberty Requires Greater Procedural Protection Than Any Other Constitutionally Protected Interest.

In *Lassiter v. Department of Social Services,* this Court concluded that the right to counsel presumptively attaches only when a litigant faces a loss of physical liberty. By so holding, this Court recognized explicitly that the loss of liberty requires greater procedural protection than any other constitutionally protected interest. *Lassiter* was a culmination of many due process cases in which the Court required counsel when one suffers a loss of physical liberty, e.g. *In re Gault, supra,* 387 U.S. at 34-42, while concluding that government action that does not result in a loss of an absolute liberty interest does not require counsel. *Morrissey v. Brewer, supra,* 408 U.S. at 480; *Gagnon v. Scarpelli, supra,* 411 U.S. at 781; *Scott v. Illinois,* 440 U.S. 367, 373-374 (1979). Similarly, this Court has recognized that no automatic right to counsel exists when one faces the loss of a property right. *Goldberg v. Kelly, supra,* 397 U.S. at 270. Conversely, the loss of liberty that a juvenile suffers as a result of delinquency proceedings mandates the imposition of the privilege against self-incrimination, 387 U.S. at 42-55, appropriate notice, 387 U.S. at 33-34, and the right to confront and cross-examine adverse witnesses, 387 U.S. at 57. As this Court recognized in *Gault,*

> A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. 387 U.S. at 36.

The Due Process Clause mandates the imposition of other procedural guarantees when a litigant faces a loss of liberty. A defendant whom a Court finds satisfies the

criteria for confinement under a sexual offender statute must be provided with not only counsel, but notice and the right to cross-examine witnesses. *Specht v. Patterson,* 386 U.S. 605, 610-611 (1967). On the other hand, the privilege against self-incrimination does not protect a probationer facing a loss of a conditional liberty interest as a result of a probation revocation proceeding. *Minnesota v. Murphy, supra,* ____ U.S. at ____, 104 S. Ct. at 1147, n. 7, although the state must provide him with appropriate notice and a conditional right to confront and cross-examine witnesses. 411 U.S. at 786. In sum, an individual who faces a loss of an absolute liberty interest is entitled to greater procedural protection than any other litigant aggrieved by governmental action. See *Gagnon v. Scarpelli, supra,* 411 U.S. at 789, n. 12.

C. The Consequences Flowing From a Finding of Hospitalization under a State's Civil Commitment Law are Nearly as Severe as the Consequences of a Criminal Conviction.

The consequences of a criminal conviction are so severe that the Due Process Clause requires the imposition of procedural protections upon a criminal trial than might not be necessary in any other setting. *Addington v. Texas, supra,* 441 U.S. at 423. (Compare *Duncan v. Louisiana, supra,* right to jury trial in criminal proceedings with *McKeiver v. Pennsylvania, supra,* no right to jury trial in delinquency proceedings.) However, an individual found in need of involuntary hospitalization suffers the same consequences as he would if convicted criminally—the loss of liberty and the imposition of a stigma that result from society labeling him either "criminal" or "mentally ill" and "dangerous". *In re Winship, supra,* 397 U.S. at 363 (1970); *Addington v. Texas,* 441 U.S. at 425-426. Indeed, since both a civil committee, a delinquent and a prisoner

receive rehabilitative measures when confined, see *Addington v. Texas, id.* at 422, *McKeiver v. Pennsylvania, supra,* 403 U.S. at 552 (*White,* J. concurring); *Morrissey v. Brewer, supra,* 408 U.S. at 484; case law indicates that the major difference between a finding of criminal guilt and a determination of the need for involuntary hospitalization is the imposition of blameworthiness that society imposes upon a convicted defendant. *McKeiver v. Pennsylvania, supra,* 403 U.S. at 551-553 (*White,* J. concurring). (See also *Addington v. Texas, supra,* 441 U.S. at 428 in which this Court emphasizes the punitive nature of a criminal trial.) As such, the Due Process Clause imposes some, but not all, procedural requirements of a criminal trial upon a civil commitment proceeding.

As noted, decisions by this Court establish that the greater the consequences of a particular proceeding, the greater amount of procedural protections the Fourteenth Amendment requires. (See also *Woodby v. Immigration and Naturalization Service,* 385 U.S. 276, 286 (1966), burden of proof of clear and convincing evidence in deportation proceedings.) Thus, when determining whether or not the privilege against self-incrimination applies to the adjudicatory stage of a civil commitment hearing, this Court must recognize the severe consequences that result from a determination of the need for involuntary confinement. It must then evaluate the nature and function of the privilege against self-incrimination and to what extent the adjudicatory stage of a civil commitment proceeding will implicate the values underlying the privilege. This Court must also examine to what extent the invocation of the privilege will alter the nature of a civil commitment proceeding and impact adversely upon such hearing.

This Court in *Lassiter,* as did the Illinois Supreme Court in the present case, applied the criteria enunciated in

Mathews v. Eldridge, to determine just what due process requires. Reliance upon such criteria is incorrect. This Court has recognized that the function of the legal process is to "minimize the risk of erroneous decisions," *Addington v. Texas, supra*, 441 U.S. at 425 (1979) and a central concern of this court in *Mathews* was the reliability of existing procedures and the probable value of additional procedural safeguards. 424 U.S. at 343. However, the "privilege against self-incrimination is not an adjunct to the ascertainment of truth." *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966). Instead, the values underlying the privilege include, *inter alia*, the societal concern for individual privacy and a fair state-individual balance. *Murphy v. Waterfront Commission of New York Harbor, supra*, 378 U.S. at 55 (1964). Consequently, the application of the Mathews formula does not address the rationale for applying the privilege. The application of such formula could possibly result in the conclusion that the privilege does not enhance the reliability of the fact-finding process. On the other hand, an application of the criteria previously delineated will establish that the privilege against self-incrimination applies to the adjudicatory stage of a civil commitment proceeding.

D. Application of the Above Propositions Establish that Under the Due Process Clause of the Fourteenth Amendment the Privilege Against Self-Incrimination Attaches at the Adjudicatory State of a Civil Commitment Proceeding.

Much of the rationale for the use of the privilege in a criminal trial applies with equal force to a civil commitment proceeding. The policies underlying the privilege consist of, *inter alia*, a desire for an accusatorial system of justice; a desire for a fair state-individual balance by requiring the government to leave an individual undisturbed

until good cause is shown and further requiring the government shoulder the entire load with its contest with the individual, and; a respect for the inviolability of the human personality and the right of each person to a "private enclave." *Murphy v. Waterfront Commission, supra,* 378 U.S. at 55. A civil commitment proceeding implicates these values.

When a state attempts to civilly commit an individual it alleges that such person is mentally ill and dangerous, *Jones v. United States,* 463 U.S. 354, 368 (1983), to a degree that justifies involuntary confinement. Monahan & Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment,* 2 L. and Human Behav., 37, 38 (1978). As is the case with a criminal trial, the state utilizes its power and resources to involuntary confine someone. Because of the loss of liberty and stigma that result from involuntary confinement, *amicus* perceives no reason why a civil commitment hearing should be any less accusatorial than a criminal trial. As this court noted in *In re Gault,* "(T)he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." 387 U.S. at 49.* To the extent that the state subjects an individual to an examination to obtain in-

*That a state may provide a civil committee with treatment is irrelevant. To justify the imposition of fewer procedural safeguards on the grounds that the state provides a benefit or potential benefit is to adopt the *quid pro quo* theory for the lack of procedural safeguards, an approach that the Chief Justice soundly criticized in *O'Connor v. Donaldson,* 42 U.S. 563, 585-587 (1975) (*Burger,* C.J., concurring). Furthermore, like a civil committee, a prisoner receives rehabilitation while incarcerated. Ill. Ann. Stat. ch. 38 §1-2 (Smith-Hurd) *People v. Williams,* 288 N.E. 2d 636-637 (Ill. App. 1972); Minn. Stat. Ann. §609.01(1); N.J. Stat. Ann. §2C 1-2(2) (West.); N.Y. Penal Law §1.05(5) (McKinney); Tex. Penal Code Ann. tit. 1 §1.02(1)(b) (Vernon); See also *Morrissey v. Brewer, supra,* 408 U.S. at 480.

formation to determine whether or not such person satisfies the criteria for commitment, such examination is analogous to a custodial interrogation when the police question a suspect to determine potential guilt. By subjecting an individual to a compelled examination at the adjudicatory stage of a civil commitment hearing, the government alters the state-individual balance by requiring an individual to provide the state with material, in this case, verbal utterances, which the state can use to prove its case for hospitalization.* Furthermore, a forced psychiatric examination destroys an individual's "private enclave." Such examinaton seeks to uncover substantial portions of individual's personality, the "inviobility of which is fundamental to privacy. Note, *Miranda on the Couch: An Approach to Problem of Self-Incrimination, Right to Counsel and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants,* 11 Columbia J.L. & Soc. Prob. 403, 421 (1975).

The privilege is also designed to ensure that any admissions are reliable expressions of the truth. *In re Gault, supra,* 387 U.S. at 47. However, when a court appoints a doctor to examine an individual, such individual may already be labeled mentally ill and one's predetermined ideas about such individual may preclude objective consideration. *Miranda on the Couch* at 423. Similarly, just as a custodial interrogation may result in unreliable admissions from a suspect the police believe is guilty, a psychiatric examination of an individual whose mental state has been called into question by a court may result in an unreliable diagnosis; one that is colored by the belief that this person must suffer from mental illness or he

*_Estelle v. Smith,_ 451 U.S. 454 (1983) establishes that statements by a patient in a psychiatric interview do not constitute nontestimonial evidence but rather evidence that is communicative in nature which the Fifth Amendment protects. 451 U.S. at 463-464.

would not be before the court in the first place. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 Calif. L. Rev. 693, 722 (1974).

While this Court has recognized that a civil commitment hearing cannot be equated with a criminal trial, *Addington v. Texas,* 441 U.S. at 428, both the similarities and differences between the two miliate toward the application of the privilege at the adjudicatory in the former proceeding. Like a criminal trial, a civil commitment hearing is a formal judicial proceeding in which counsel represents an individual facing a loss of liberty.* Consequently, just

*In forty-eight of fifty states civil commitment is a formal judicial proceeding in which a civil committee is entitled to the assistance of counsel. Ala. Code tit. 22 §§52-8, 52-4; Alaska Stat. §§47.30.725 (b), 47.30.725 (d); Ariz. Rev. Stat. §§36-535, 36-537, 36-528; Ark. Stat. Ann. §§59-1402, 59-1408; Cal. Welfare and Institutions Code §5276, (West); Colo. Rev. Stat. §§27-10-111, 27-10-107(5); Conn. Gen Stat. Ann. §§17-177, 17-178, Del. Code Health & Safety tit. 16 §§5007, 5008; Fla. Stat. Ann. §394.467; Ga. Code Ann. §§37-3-61, 37-3-62; Haw. Rev. Stat. §§334-60.5, 334-60.4; Idaho Code §§66-328, 66-329; Ill. Ann. Stat. ch 91 1/2 §§3-800, 3-805; Ind. Code Ann. §16-14-9.1-5 *et seq.* (Burns); Iowa Code Ann. 229.7 *et seq.* (West); Kan. Stat. §59-2913 *et seq.;* Ky. Rev. Stat. §§202A.051, 202A.071, 202A.121; La. Rev. Stat. §§28:55, 28:53 (West); Me. Rev. Stat. Public Institutions & Corrections tit. 34-B-§3864; Mass. Gen. Laws Ann. ch. 123 §1 *et seq.* (West); Mich. Comp. Laws Ann. §339.1452 *et seq.;* Minn. Stat. Ann. §§253B.08, 253B.03(a) (West); Miss. Code Ann. §§41-21-73, 41-21-67; Mo. Ann. Stat. §632.335; Mont. Code Ann. §53-21-121 *et seq.;* Neb. Rev. Stat. §§83-1133, 83-1135; Nev. Rev. Stat. §§433A.220, 433A.270; N.H. Rev. Stat. Ann. §§135-B:3, 135-B:5; N.J. Stat. Ann. §30.4-42, N.J. Ct. R. 4:74-7(e); N.M. Stat. Ann. §§43-1-11, 43-1-4; N.Y. Mental Hygiene Law §§9.31 *et seq.,* 29.09, Judiciary Law §35 (McKinney) 22 NYCRR Part 694; N.C. Gen. Stat. §§122C-268, 122C-270; N.D. Cent. Code §§25.03.1-19, 25-03.1-13; Ohio Rev. Code Ann. §§5122.15, 5122.15(4) (Page); Okla. Stat. Ann. Mental Health Law §§54.4, 54.4(6); Or. Rev. Stat. §§426.060 *et seq.,* 426.100; Pa. Stat. Ann. tit.

(Footnote continued on following page.)

as this Court concluded in *Santosky v. Kramer*, 455 U.S. 745 (1982), that at least in New York, a permanent neglect proceeding contains many indicia of a criminal trial, 455 U.S. at 761-762, this Court must also recognize that civil commitment proceedings contain many of the same attributes. These include, but are not limited to the representation of counsel, the introduction of facts and expert opinion that tend to prove or disprove the state's case, the cross-examination of witnesses and the conducting of hearings pursuant to judicial rules of evidence.

In the present case, the State of Illinois attempted to compel Allen to assist it in proving its case against him through compulsory examination by filing a sexually dangerous person petition. The State took such action at the same time it charged Allen with unlawful restraint and deviate sexual assault. The circuit court dismissed the charges for lack of probable cause. *People v. Allen*, 481 N.E. 2d 690, 692 (1985). It appears incongruous that a state can compel an individual to assist it in proving its case against him under the civil law although it cannot do so under the criminal law, particularly when the proceedings are extremely similar in nature. The results are the same in both instances—a loss of liberty and the imposition of stigma.

While the question of whether or not an individual satisfies the criteria for involuntary confinement contains

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(Footnote continued.)
50 §7301 *et seq.* (Purdon); R.I. Gen. Laws §§40.1-5-8, 40.1-5-13 *et seq.*, S.C. Code §§44-17-510 *et seq.*; 44-17-530; Tenn. Code Ann. §§33-3-603, 33-3-608; Tex. Mental Health Law Code Ann. tit. 92 §5547-26 *et seq.*; Utah Code Ann. §64-7-36; Vt. Stat. Ann. tit. 18 §§7612, 7615, 7613; Va. Code §§37.1-67.1, 37.1-67.3; Wash. Rev. Code §§71.05.310, 71.05.300; W. Va. Code §27-5-4; Wis. Stat. Ann. §51.20 (West); Wyo. Stat. §25-10-110.

essentially medical questions, the ultimate decision made by a judge is a legal one. *State v. Krol,* 344 A. 2d 289, 302 (N.J. 1975); *Hatcher v. Wachtel,* 269 S.E. 2d 849, 852 (W. Va. 1980). See also *Vitek v. Jones,* 445 U.S. 480, 495 (1980). Thus, while some dispute exists as to whether or not the state must employ expert witnesses in civil commitment proceedings (Compare *Addington v. Texas,* "Whether the individual is mentally ill and dangerous to either himself or others and is in need of therapy turns on the meaning of the facts which must be interpreted by the expert psychiatrists and psychologists" 441 U.S. at 429 with *Jurek v. Texas,* 428 U.S. 262 (1976), dangerousness proved through lay testimony; *Mims v. United States,* 375 F. 2d 135 (5th Cir. 1967) and *Barkley v. United States,* 323 F. 2d 804 (D.C. Cir. 1963), prosecutors obtained convictions without expert testimony when defendants raised insanity defense). Indeed, the State of Illinois was not required to introduce expert testimony to commit Allen as long as it produced evidence of specific acts establishing dangerousness. *Haber v. People,* 398 N.E. 2d 121, 123 (Ill. App. 1979). However, even if this Court concludes that a civil commitment hearing requires expert testimony, the state can obtain such evidence even if an individual invokes the privilege at the adjudicatory stage of a civil commitment hearing. For instance, the state may present the necessary facts through lay testimony and can then produce the expert to interpret such facts. In other words, after the introduction of lay testimony, the state's attorney can utilize the hypothetical question. See McCormick, *Evidence* 2nd Ed. p. 31-36, *Barefoot v. Estelle,* 463 U.S. 880, 903 (1983). Similarly, a state can present the testimony of doctors who have examined the individual

other than at the adjudicatory stage of a civil commitment proceeding.*

The application of the privilege to the adjudicating stage of a delinquency proceeding is most pertinent to the present analysis. Like a civil committee, a delinquent suffers a loss of liberty from an adverse determination. However, unlike commitment proceedings, no stigma flows from a determination of delinquency. *McKeiver v. Pennsylvania, supra,* 403 U.S. at 551-553. Both the state's mental health and delinquency systems serve rehabilitative purposes. See *McKeiver v. Pennsylvania, supra,* 403 U.S. at 547, *Addington v. Texas, supra,* 441 U.S. at 429. Furthermore, unlike a delinquent, a civil committee faces the prospect of the forcible administration of "mind-altering" *Mills v. Rogers,* 457 U.S. 291, 293, n.1. (1982) antipsychotic medication. See e.g. *Project Release v. Prevost,* 722 F. 2d 960 (2nd Cir. 1983). This is particularly so when a psychiatrist perceives rightly or wrongly that an emergency exists. *Rennie v. Klein,* 720 F. 2d 266 (3rd Cir. 1983); *Rogers v. Commissioner of Department of Mental Health,* 458 N.E. 2d 308 (Mass. 1983); *In re K.K.B.,* 609 P. 2d 747 (Okl. 1980). Despite the rehabilitative nature of the delin-

Amicus does not assert that an individual may invoke the privilege to refuse to submit to examinations by an admitting doctor at a psychiatric hospital or a treating doctor at such facility. The privilege attaches to examinations conducted in connection with judicial hearings at which one's liberty is at stake.

However, a number of states, including Illinois, grant the privilege against self-incrimination to civil committees. See e.g. Ill. Ann. Stat. ch 91 1/2 §3-208; Alaska Stat. §47.30.740; Miss. Code Ann. 41-21-73(3); Ark. Stat. Ann. §59-1408 (a) (5); Mo. Ann. Stat. §632.335(4). It has been recognized that such privilege does not seriously interfere with the state's objectives of civil commitment: "Experience in the public and private sectors has shown that application of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid objectives of civil commitment." *Matter of Rizer,* 409 N.E. 2d 383, 386 (Ill. App. 1980).

quency proceedings, this Court found that the Due Process Clause compels the application of the privilege due to loss of liberty from which a delinquent suffers. *In re Gault,* 387 U.S. at 50.* Thus, if a juvenile delinquent who suffers less adverse consequences than a civil committee may assert the privilege, once this Court recognizes that a civil commitment hearing implicates the values that the privilege seeks to protect and the application will not impact severely upon the process itself, this Court must conclude that the privilege against self-incrimination attaches to the adjudicatory stage of a civil commitment hearing.

A number of lower courts have addressed the issue of whether or not the privilege attaches during a civil commitment proceeding. However, to the best of *amicus'* knowledge not one court has addressed the issue of whether or not the privilege attaches at the adjudicatory stage. Thus, the decisions of the lower courts do not constitute persuasive authority.

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*That it was the Due Process Clause that mandated the imposition of the privilege to delinquency proceedings and not an interpretation by this Court that a delinquency proceeding was the equivalent of a criminal trial was made clear in *McKeiver v. Pennsylvania, supra,* in which this Court refused to apply the right to a jury trial to delinquency proceedings. As Justice White noted, "We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence subject to all of the restrictions normally applicable in criminal cases." 403 U.S. at 551 (*White,* J. concurring). Thus, it is not a question of do the proceedings at hand satisfy the criteria enunciated by the Court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963), as some have suggested. See e.g. Note, *Developments in the Law: Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1303-1306 (1974). *Mendoza-Martinez* merely focuses on whether a particular penalty constitutes a criminal or civil sanction. No one can even suggest that a state can punish mental illness. *Robinson v. California,* 370 U.S. 660 (1962). Hence the question becomes, given the noncriminal nature of a commitment proceeding, does the Due Process Clause still require the application of the privilege against self-incrimination?

For example, the Court in *Tippett v. Maryland,* 436 F. 2d 1153 (4th Cir. 1971), *cert.* dismissed *sub nom. Murel v. Baltimore City Criminal Court,* 407 U.S. 355 (1972), concluded that the impositions of the privilege would interfere with the treatment the state seeks to provide when it commits. 436 F. 2d at 1158. See also *Project Release v. Prevost,* 551 F. Supp. 1298, 1308 (E.D. N.Y. 1982). However, at noted, application of the privilege at the adjudicatory stage will not interfere with the interaction between patient and his treating psychiatrist. The Court in *French v. Blackburn,* 428 F. Supp. 1351 (M.D. N.C. 1977) relied on Judge Sobeloff's rationale in *Tippett* that the application of the privilege would interfere with the state determining whether or not an individual satisfied the criteria for confinement. 428 F. Supp. at 1359. However, application of the privilege at the adjudicatory stage results in no such interference. Other cases cited by the Illinois Supreme Court in this matter merely concluded that because a commitment proceeding is civil, the privilege does not attach. However, this Court in *Gault* noted clearly that the civil-criminal label is irrelevant. 387 U.S. at 49-50. The court in *Moss v. State,* 539 S.W. 2d 936 (Tex. Civ. App. 1976) rationalized its refusal to apply the privilege during a commitment proceeding on the ground that psychiatric exams were not untrustworthy. However, in so holding, the Texas court ignored the other purposes of the privilege that an examinatin at the adjudicatory stage implicates.

One may argue that application of the privilege at the adjudicatory stage together with the claiming of the doctor-patient privilege will interfere with a court obtaining sufficient information to reach an educated verdict. Such argument lacks merit for a number of reasons. As noted, even if an individual asserted the privilege against

self-incrimination at the adjudicatory stage and the doctor-patient privilege to prevent his treating physician from testifying, a court could still rely on testimony from an admitting psychiatrist, testimony from a non-treating testifying psychiatrist who answered hypothetical questions and non-opinion lay evidence. Furthermore, to the extent the privilege against self-incrimination at the adjudicatory stage conflicts with the imposition of the doctor-patient privilege in the sense that application of both will unduly interfere with a judicial determination, *amicus* believes that the privilege against self-incrimination must attach at the expense of the doctor-patient privilege. As noted, psychiatric examinations at the adjudicatory stage implicate the values underlying the privilege. On the other hand, the purpose of the doctor-patient privilege is to foster a therapeutic doctor-patient relationship. See VIII. J. Wigmore, *Evidence* §2380a. However, furthering doctor-patient communication is hardly a weighty concern when the state involuntarily places an individual on such treatment regimen in the first place. Whether or not an involuntarily confined patient chooses to engage in a treating relationship with a psychiatrist hardly depends upon whether or not communication will remain in confidence. Of far greater concern to the patient is whether such communication will lead to release. Furthermore, the historical role the privilege against self-incrimination has played within this nation's legal system dictates that if a court believes application of both the self-incrimination and the doctor-patient privilege will unduly interfere with a civil commitment determination, the self-incrimination privilege must be upheld. As this Court has noted,

> The privilege against self-incrimination registers an important advance in the development of our

> liberty—one of the great landmarks in man's struggle to make himself civilized. *Murphy v. Waterfront Commission, supra,* 378 U.S. at 55 citing *Ullman v. United States,* 350 U.S. 422,426 (1956).

See also VIII J. Wigmore, *Evidence* §§2250-2252.

Courts that have applied the privilege against self-incrimination to civil commitment proceedings constitute more persuasive authority than courts who have not done so. The court in *Suzuki v. Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976), while not addressing the issue of the application of the privilege to the adjudicatory stage, recognized the tension between the loss of an individual's liberty and the need for the state to obtain information to make a decision whether or not to commit. Noting the inquisitorial nature of compelled psychiatric exams, 411 F. Supp. 1130-1132, the court concluded that if no evidence existed apart from that obtained during a compelled examination, there should be no commitment. In other words, the state had ample opportunity to obtain evidence to justify involuntary confinement other than through a compelled psychiatric examination. Similarly, while the Court in *Lessard v. Schmidt,* 349 F. Supp. 1078 (E.D. Wisc. 1972), vacated on other grounds 414 U.S. 473 (1974), reinstated and enforced 379 F. Supp. 1376 (E.D. Wisc. 1974), vacated on other grounds, 421 U.S. 957 (1975), reinstated 413 F. Supp. 1318 (E.D. Wisc. 1976), did not engage in the most extensive analysis, its reliance on *In re Gault* and its focus on the loss of liberty for which civil committees suffers to uphold the application of the privilege, is certainly more persuasive than the decisions relied upon by the Illinois Supreme Court.

Conclusion.

For the reasons given in this brief, this Court should conclude that the privilege against self-incrimination attaches at the adjudicatory stage of a civil commitment proceeding which permits an individual to refuse to submit to a psychiatric examination conducted pursuant to such a hearing.

Respectfully submitted,

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